

Our Own People

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At which point does one stop being a German? What must one do or have done so that one's own state can say: We are done with you, you are no longer our concern, from us you have nothing to expect and hope for any more? When can a state discard, banish, expel its own citizens? It is the "Islamic State" at the hour of its downfall that confronts the Federal Republic of Germany with this question, in the form of dozens of former IS fighters and their relatives currently held in Iraqi, Kurdish and Syrian prisons: They are German citizens, so Germany is obliged to take them back under human rights and customary international law. As attractive as it may seem in terms of security policy to keep these immensely dangerous people and their indoctrinated relatives as far away from German territory as possible: We mustn't. This is not just foreign affairs. These are our own people.

And they remain so. Fighting for the IS is, according to current German law, not a matter that entails the loss of citizenship. Only those who enter the armed forces of a foreign state will be deprived of their German citizenship, and the IS, as is well known, was never more than a terrorist organisation, no matter how badly it wanted to be a state. Unlike many other states in and beyond Europe, Germany has not yet decided to turn its citizenship law into a weapon of anti-terrorism. There is, however, a draft law of the Federal Home Office which tries to do that, implementing a coalition agreement made by the governing parties CDU, CSU and SPD in 2018. But firstly, the SPD-led Federal Ministry of Justice appears to be in no hurry at all to take a stance of its own towards this thorny matter, and secondly, the legislation would come too late for the current case of the detained IS fighters anyway.

Participation in combat operations

In any case, I managed to get my hands on the Home Office paper which I find extraordinarily interesting in several respects. According to the draft law, "participation in combat operations for a terrorist militia abroad" would entail the loss of German citizenship by law, provided that the person concerned "does not thereby become stateless". Minors are excluded. The draft defines a "terrorist militia" as a "paramilitarily organised armed association which pursues the aim of forcibly eliminating the structures of a foreign state in a manner contrary to international law and of establishing new state or state-like structures instead". This seems to apply not only to the IS, but also to PKK, Hamas and Hezbollah, Donetsk and Lugansk, FARC, Real IRA, you name it.

It is not a formal act that leads to the loss of citizenship but simple factual "participation in combat operations". Also, it doesn't matter if you have the citizenship of the country you fight for, as long as you don't become stateless after losing the German one. In both respects, the new element of loss of citizenship is different from the existing one referring to joining foreign armed forces. Therefore, fighting

on Assad's side would not put your German citizenship at risk unless you hold the Syrian citizenship at the time of your entry into Assad's troops. Fighting for the FSA, however, would.

What counts as participation in combat operations would be understood as extensively as possible. According to the explanatory memorandum, participation means "all support ... which goes beyond the mere stay in the combat zone". Taken at face value, this would mean: cook a soup for the troops, change the bandage for a wounded guerrilla, and bam! – you're no longer a German.

This happens automatically, by law. This does not require an administrative act. No public authority needs to issue a decision which may be subject to legal remedies with suspensive effect. The citizenship automatically disappears the very minute one "participates in combat operations"; the authorities then only have to formally declare this legal consequence.

Poor constitutional law

The reason for this is probably located in the Constitution: Art. 16 (1) of the *Grundgesetz* categorically prohibits the *withdrawal* of German citizenship, as opposed to the *loss* of citizenship which remains possible even against the will of the person concerned. You can't be stripped of your citizenship merely in the interest of the state, but you can lose it, the way you lose a subway ticket, or your right to enter a club even if you only stepped out for a minute to smoke a cigarette.

This means that the legislator, to be on the safe side in terms of constitutional law, has to paint the behavior that leads to loss of citizenship as a signal that the person herself is to blame and has somehow relinquished her membership of her own accord. Against this background, the Home Office draft interprets the participation in combat operations of a terrorist militia abroad as "turning away from Germany", no matter whether Germany is the object of these hostilities at all. How is aiding and abetting, let's say, Zapatista guerrillas in Mexico a statement that you have decided to "turn away from Germany"? Would such a case pass scrutiny before the Federal Constitutional Court? I wouldn't bet much on it, to say the least.

In general, the matter at hand reveals that our constitution is not always as well-crafted as *Verfassungspatrioten* like me would like to think: Art. 16 tears down in its second sentence much of what it builds up in its first. In sentence 1 it prohibits withdrawal of citizenship, the loss of which is regulated in sentence 2 while no-one really can tell precisely what distinguishes one from the other. The cases encompassed by "loss of citizenship" have changed greatly over the decades, and many of them were relics of earlier understandings of exclusive nationality which have turned into an embarrassment over time and have been abolished accordingly, such as the non-fulfilment of military service or the marriage of a German woman to a foreigner. Even the case of military service in a foreign army, formally still valid today, is both practically and theoretically pretty much obsolete in these times of common-practice multiple citizenship, I suppose. In the sense of the consistency of the constitution, it might be best to state unequivocally in Article 16 that the loss

of citizenship occurs either voluntarily or as a sanction of fraudulent citizenship application, and in all other respects deprivation of citizenship should be an absolute no-no.

The trend is rather to the opposite, as I am well aware of. Citizenship law is increasingly being converted into a tool of security policy worldwide, and a rather blunt one at that. The fact that the Social Democrats have agreed to do the same for Germany in the coalition agreement is a shame and is hardly outweighed by their current obstruction policy.

By the way: the Home Office draft also contains a great many other things that would merit inspection. I can't go into all of them here, so just one point, very briefly: The law would make all kinds of naturalisation strictly dependent on being able to prove one's identity. That may sound obvious, but for a large number of refugees in Germany with no access to documents issued by the very authorities they have fled from in the first place, that would become an insurmountable obstacle for their long-term integration, I should think. The draft law also extends this requirement to children: If their parents cannot prove to the satisfaction of the authorities that they are who they claim to be, then, according to the draft law, their offspring will also never be able to become a German – and, in consequence, neither will *their* children and grandchildren, I suppose. In this way, a whole stratum of the population in Germany with a precarious identity would be created, to be passed down from generation to generation. One more reason to hope that this law never passes.

Bad guys who win

This week's good news: perhaps the wind is finally turning for, or rather against, **Hungary's** strongman Viktor Orbán and his European Parliament alliance situation. The European People's Party under *Spitzenkandidat* Manfred Weber appears to be tiptoeing towards the realisation that Orbán might eventually turn from an asset into a liability at the EP ballot box. The European state of knowledge about what kind of guy Orbán is and what he is up to hasn't changed much recently, except that the rabidly anti-Semitic Soros campaign Orbán has been waging for years now has been [extended](#) to the person of Jean-Claude Juncker, the incumbent Commission President and fellow senior EPP figure whom Weber intends to succeed. Did the [jolly dictator](#) finally overstretch his EPP buddies' indulgence? Even CSU leader Markus Söder has distanced himself from Orbán by now. That's not to be underestimated.

For the time being the polls for the **European** elections seem to show no dramatic change in the majority situation: The bad guys may be on the rise but nevertheless are likely to remain on the fringes. Still there is no reason to call off the alarm, according to [JOHN MORIJN and ISRAEL BUTLER](#) who warn that this interpretation would be deeply misleading.

In **Spain**, a trial of the century is under way against the leaders of the Catalan independence movement, and [JOSÉ LUIS MARTÍ](#) examines the troubling interferences between law and politics that accompany this political trial *par excellence*.

In **Germany**, the Federal Constitutional Court has declared unconstitutional the manner in which the Federal Electoral Law excludes certain people with disabilities from the election to the German **Bundestag**. [VALENTIN AICHELE](#) praises the ruling and suspects that it will not be easy for the legislator to establish a sustainable criterion to justify the exclusion of people with disabilities from elections at all, including the upcoming European elections.

In the ongoing refugee crisis at the **EU's** external borders, the ECHR in Strasbourg is an island of hope in terms of reining in collective expulsions and pushbacks under human rights law. [LENA RIEMER](#) draws attention to the forthcoming *N.D. and N.T. v Spain* judgment, which will show how safe this island is in the rising tide of anti-refugee sentiment in Europe.

In **Germany**, the University of Kiel has banned students from wearing a niqab while attending lectures: The veil impedes facial communication between teachers and students. [JENS THEILEN](#) scrutinizes the case under the constitutional case law on headscarf bans and comes to the conclusion: Mere discomfort does not justify an infringement of religious freedom.

In **Romania**, the scales keep tilting against the independence of the judiciary. The government is less inclined than ever to expose its corrupt ways to the risk of independent judicial review. [BIANCA SELEJAN GUTAN's](#) report will not exactly lift your spirits but is well worth reading nevertheless.

In the **USA**, President Trump's national state of emergency for the purpose of building the Berlin Wall has turned out to only not be factually but possibly also legally inconsequential: In part II of her analysis, [KIM SCHEPPELE](#) shows that Trump's state of emergency may never come into effect at all, which in no way reduces the danger for the US constitution. [BILL SCHEUERMAN](#) shakes his head in horror at Trump's justification that he has declared an emergency to accelerate things – a perversion of the usual justification of emergency measures that things are happening too fast for the authorities to keep up with.

Elsewhere

[VERNON BOGDANOR](#) sees post-brexite **UK** on its way towards a written constitution.

[JUDITH VERMEULEN](#) analyses a ECtHR decision on whether **UK** is entitled to store the data of a nonagenarian peace activist.

[DAVID ERDOS](#) examines a CJEU ruling in the case of a **Latvian** blogger on the tension between data protection and freedom of expression.

On the occasion of the arrest of two Assad officers in Germany, [HAYLEY EVANS](#) pins her hopes on Europe to bring **Syrian** torturers and war criminals to justice.

[PATRICK WACHSMANN](#) laments the misery of constitutional review of laws in **France** on the occasion of the toothless verdict of the *Conseil constitutionnel* on the criminalization of prostitution clients.

[THIBAUT GUILLUY](#) criticises the practice of nominating members of the the **French** Constitutional Council which he sees quite far away from being a genuine constitutional court.

[PAUL CLITEUR](#) commemorates on the occasion of 20 years of fatwa against Salman Rushdie the invention of the tactic of "theoterrorism" in **Iran**.

[PIERRE DE VOS](#) sees the reputation of the Constitutional Court of **South Africa** severely damaged by its procedurally questionable judgment *Jacobs et al. v. S.*

[JOSH BLACKMAN](#) calls on the **US** Congress to clarify and restrict the rules on national emergencies.

Alright then, that's it for now. Have a great week, and all the best,

Max Steinbeis

